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# Lavar C. Fox v. Allstate Insurance Company : Brief of Respondent

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# In The Supreme Court of the State of Utah

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LAVAR C. FOX,

Plaintiff and Respondent,

-vs-

ALLSTATE INSURANCE COMPANY,

Defendant and Appellant.

Case No.

11336

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## BRIEF OF RESPONDENT

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Appeal from the Judgment of the District Court of  
Salt Lake County, Utah  
HONORABLE STEWART M. HANSON, Judge

---

MARK A. MADSEN  
330 East 4th South  
Salt Lake City, Utah 84111  
Attorney for Plaintiff  
and Respondent

STRONG & HANNI AND  
WENDELL E. BENNETT

604 Boston Building  
Salt Lake City, Utah 84111  
Attorney for Defendant  
and Appellant

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

Respondent is in substantial agreement with Appellant's statement of the case.

### DISPOSITION IN LOWER COURT

Summary Judgment was granted in favor of Plaintiff and against the Defendant in the sum of \$2,230.00 plus costs.

### ACTION SOUGHT ON APPEAL

Respondent seeks affirmance of the Judgment of the Trial Court.

## STATEMENT OF FACTS

Respondent purchased an in-board-out-board, seventeen foot glasspar boat and motor in or about March, 1965 for \$2,000.00 cash (R-6). Subsequently, on or about the 30th day of April, 1965, Respondent obtained a policy of insurance coverage on said boat from the Appellant (R-7), thereafter, on or about the 2nd day of May, 1965, the boat and motor were lost while Respondent was boating on Utah Lake (R-17).

Appellant refused to make payment to Respondent under the terms of the policy of insurance written upon the boat and motor of Respondent, although at one time they informed Respondent that they would do so (R-17).

## ARGUMENT

## POINT I

THE LOWER COURT CORRECTLY GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENIED DEFENDANT'S MOTION TO ALTER OR AMEND BASED ON THE RECORD BEFORE THE COURT.

Respondent does not question the fact that Appellant's Answer put in issue all of the allegations of the Complaint. However, it is respectfully submitted that Request for Admissions (R-4-10) and the answers thereto (R-11-12), together with the Affidavit of Respondent (R-17) in connection with the Motion for Summary Judgment shifted the burden forceful-

ly to Appellant. This burden could not be, and was not, in fact, met by the vague, verbose, irrelevant, inadmissible, and inexact elements of the Affidavit of Keith Lambourne (R-18-19), submitted in opposition to the Motion for Summary Judgment.

Paragraphs number 2, 5, 6 and 7 of the Affidavit of Keith Lambourne all seek to raise issues outside the pleadings, and which Appellant had waived by failure to assert those matters by way of affirmative defense. It is well established that the breach of insurance policy provisions must be raised by affirmative pleading. **State Farm Mutual Auto Insurance Company vs. Koval**, CCA 10th, 1944, 146 F2d, 118. The cited case holds that a claim for breach of cooperation clause is an affirmative defense and must be specially pleaded.

Our Rule 8(c) is substantially the same as the Federal Rule, and is identical as regards the matter for which it is cited in this case. There are nineteen of the most commonly invoked defenses listed in the rule, but it is not limited to those so listed. A substantial review of the Federal Law developed around Rule 8(c) is reported in Barron and Hotlzooff, Federal Practice and Procedure, Rules Edition, Volume IA, Section 279. At page 161 of the cited volume, was read:

“Other matters which have been held by the Courts to constitute affirmative defenses which must be specifically pleaded include . . . breach of insurance policy provisions”

At page 163 of the cited volume, it is reported:

"In an action for a loss covered by an insurance policy, the burden is on the defendant insurer to show that the loss was excepted by the terms of the policy"

and at page 166, Barron and Holtzoff, it says:

"Generally a failure to plead an affirmative defense results in a waiver of that defense and it is excluded as an issue in that case".

(citing Allstate Insurance Company vs. Moldenhauer, CA7, 1952, 193 and others).

In **Carol vs. Paramount Pictures**, DC New York, 1963, 3 FRD 47, the Court states:

(Matters) "although discussed in great detail in these papers submitted to the Court, may not be considered as they have not been pleaded as affirmative defenses and are therefore not in issue".

Rule 12 of the URCP, provide that with four stated exceptions, (none of which are relevant here) a party waives all defenses and objections which he has not raised by Motion or Answer. At page 370, Barron and Holtzoff, above cited, it is stated.

"There are no other exceptions or qualifications".

Paragraph number 3 of Affidavit of Keith Lambourne (R-18-19) is at best irrelevant. Respondent asserted in his Affidavit that the boat and motor insured with the Appellant was lost as stated in Utah



Lake (R-17). This affirmation was unequivocal, and in order to present a material issue of fact to go to Trial, the Appellant was bound by Rule 56(c) to affirmatively state that no boat insured by the Appellant and belonging to the Respondent was lost. The best this Appellant can come up with is an "I couldn't find it" plaint. It is not conceivable that under our rules, this can be given effect or taken seriously.

This leaves paragraph number 4 of the subject Affidavit for consideration. (Paragraph number 1 is neither controverted nor significant in the subject matter of the law suit itself). Respondent's Affidavit is clear that it was "his boat" (R-17). It is respectfully submitted that the law does not require the Plaintiff to satisfy the Defendant on a question of ownership in a suit such as this. Indeed, from the history of this case, it is suggested that there may well be no quantum of evidence which would be sufficient to satisfy this reluctant insurance company. The fact is that Respondent has unequivocally and without reservation affirmed under oath that he owned the boat which was covered by an insurance policy written by the Appellant, and that the boat was lost. A mere allegation that no proof of ownership has been submitted to them is therefore, subject to the same defect as that urged for paragraph number 3 above.

There is another and equally fatal flaw in the Affidavit of Keith Lambourne which should be controlling. The Affidavit shows on its face that it is

based on hearsay. The facts allegedly asserted by the Affiant relate to action of others and not the Affiant. The Affiant does not state that they were performed in his presence nor that he had any personal knowledge of those facts. This violates Rule 56(c) URCP which provides that Affidavits must be made on personal knowledge of facts which would be admissible in evidence, and show affirmatively that the Affiant is competent to testify in the matters therein stated. In this instance, the Affiant fails to show affirmatively that he is competent to testify to a single paragraph in his Affidavit with the exception of the first, and on the contrary, affirmatively shows that he is not so competent to testify.

In fact, the effect, if not the detail of the sworn statement of Keith Lambourne (R-18-19) and particularly paragraph number 4 is false, which fact is known to him in all probability and certainly to counsel for the Appellant. While it is not reflected in the record, it is a matter of record that Respondent provided the Appellant with a receipt from his seller for the boat in question. Counsel has requested return of this receipt for the purpose of this suit, and although counsel for Appellant has agreed to obtain and return it, it has not been so returned to this date. This matter was covered in argument of counsel in the Court below.

All of the issues raised by Appellant's Answer were clearly and unequivocally met by Respondent's Affidavit so that at this point there was no remaining issue. Appellant urges that there is no proof

of damages in the record. However, Respondent has made a prima facie case which is nowhere controverted by the Appellant. The document attached as the first Exhibit to Respondent's Request for Admissions shows on its face what the value of the boat and motor were as of the date of the policy. This was less than a week before the loss of the insured property. In addition thereto, the Appellant does have the receipt hereinabove referred to which shows the purchase price of the boat. All of this within approximately one month of the loss of the boat. Also, Respondent testified under oath as to the price he had paid for the boat in his Deposition cited by Appellant. The policy of insurance which Appellant admits was issued in their Answer to Request for Admissions (R-11-12) provides for no deduction if the property is a total loss. All of this information is as readily available to the Appellant as to the Respondent and for this reason was never put in issue except by way of general denial, and met by the documents in the record herein referred to.

With regard to the amount of the Judgment, it is deemed sufficient to note that the Complaint asked for interest according to law on the sum of \$2,000.00 from a specific date, and under the circumstances this can scarcely in good faith be urged as a valid point of error. No objection was interposed by Appellant on this point or on the question of damages either in the hearing on Motion for Summary Judgment or at the hearing of his Motion to Alter or

Amend the Judgment, and therefore waived in all events.

Appellant's effort to raise issues through the Affidavit of Keith Lambourne were abortive as canvassed hereinabove by the numbers. Thus the Judgment was proper and should be sustained.

## POINT II

ARGUMENT OF COUNSEL MADE AT HEARING ON MOTION FOR SUMMARY JUDGMENT IS NO SUBSTITUTE FOR PROPER PLEADINGS AND CAN NOT BE USED TO RAISE ISSUES THAT WERE NOT OTHERWISE PROPERLY BEFORE THE COURT.

Appellant has incorrectly represented the argument of counsel at the hearing on Motion for Summary Judgment. Certainly, counsel did not argue that "any defenses that the defendant had would have to have been raised as an affirmative defense under Rule 8(c) of the Utah Rules of Civil Procedure". On the contrary, counsel did urge that THE ISSUES SOUGHT TO BE RAISED BY THE AFFIDAVIT OF KEITH LAMBOURNE OUTSIDE THE PLEADINGS, were waived because not timely and correctly presented. The effectiveness of the general denial Answer to put the allegations of Plaintiff in issue was never questioned.

This brings us to the "Defendant's understanding of the Rules . . . ". It is respectfully urged that such a condition is not and **can not be given weight** in the law. Here, as elsewhere in its Brief, Appellant seeks exoneration and reprieve because of what De-

fendant "understood". The Trial Court has entered its Judgment pursuant to the Rules and the law based on the legal effect of the particular pleadings and documents before it, and without reference to the understanding of the effect of those documents on the part of either parties or counsel. We believe this is elementary law and manifestly correct.

**Russell vs. Hooper Irrigation Company**, 20 U2d 173, cited by Appellant is clearly no authority for the broad proposition for which it was urged. Justice Henroid emphasized that in THIS (the Hooper) case, an issue was raised as to a material fact on oral argument. There is nothing in the cited case to indicate a disposition on the part of this Court to render oral argument at hearing on a Motion for Summary Judgment a legally effective substitute for proper pleading and particularly where the rules have already effected a waiver of the matters so argued. To so conclude is to render meaningless the clear provisions of Rules 56, 8(c) and 12(h), URCP.

Respondent, while holding that the issues sought to be raised by Appellant for the first time in the Affidavit of Keith Lambourne were legally waived as hereinbefore argued would, nevertheless, be inclined to exercise some element of legal charity if th matter so put forward came to the knowledge and attention of Appellant after the Motion for Summary Judgment was filed by Respondent. The facts are very clearly otherwise. Counsel for Appellant advised Respondent's counsel by telephone of the purported real defenses of the In-

surance Company the day before the Answer was received. It was a genuine surprise to see that these alleged defenses were not affirmatively stated in the Answer. In subsequent conversation between counsel after the Motion for Summary Judgment was filed, Appellant inquired as to the purpose of the Motion and was pointedly advised that all of the defenses theretofore discussed had not been pleaded and the Plaintiff was entitled to a Judgment on the issues which had been raised. Nevertheless, no Motion for Leave to File an Amended Answer was then made or in fact has been made at all. It is clear, that failure to plead the affirmative defenses hinted at and sought to be raised by innuendo in the Affidavit of Lambourne was intentional and not accidental. The nature of the referenced Affidavit and whole history of this case shows that the Appellant is without any information legally sufficient to substantiate such defenses and they are therefore unwilling to affirmatively plead any such defenses. Appellant has had more than three years in which, with their unquestionable resources, to develop information to substantiate any real defenses, but they have failed to do so. Should the Appellant be entitled to have it both ways?

### POINT III

**SUMMARY JUDGMENT WAS GRANTED TO PLAINTIFF IN ACCORDANCE WITH THE RULES AND THE LAW AND APPELLANT'S MOTION TO ALTER OR AMEND WAS CORRECTLY DENIED.**

Respondent does not argue with the law cited

generally by Appellant with regard to safeguarding jury Trial when there is a genuine issue of material fact. But it is submitted that none of the arguments of Appellant's Brief are sufficient to overcome the fact that the pleadings, Request for Admissions and Deposition, together with the legal effect of the Affidavit show affirmatively that the Plaintiff was entitled to a Judgment as a matter of law, there being no genuine issue of material fact. The refusal of the Court to Alter or Amend the Judgment and to vacate the same as requested by Appellant was, therefore, proper.

In all events, the Affidavit of the Respondent (R-17) establishes an undisputed account stated. The Affiant affirmatively states that the insurance company had agreed to pay the claim and then subsequently refused to do so. This allegation stands undisputed in all the pleadings and the record, and is sufficient by itself to be controlling in this matter.

Respondent elects not to canvass the many Utah cases respecting the weight to be accorded the decision in the lower Court, believing that this Court has a much more conclusive and inclusive grasp thereof than does the Respondent or his counsel, since it must be urged by nearly every Respondent filing a Brief or arguing before the Court.

## CONCLUSION

It is respectfully submitted that the pleadings, Deposition and admissions on file, together with the Respondent's Affidavit, show that there was no gen-

uine issue as to any material fact. The Trial Court correctly granted Judgment to Respondent as a matter of law, and this Judgment should be affirmed.

Respectfully submitted,

MARK A. MADSEN

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330 East 4th South  
Salt Lake City, Utah 84111

Attorney for Plaintiff  
and Respondent